

C O P Y

W-2763

Mr. James J. Barry, Commissioner
Department of Public Welfare
State House Annex
Concord, New Hampshire

Dear Mr. Barry:

This is in response to your request of July 12, for our opinion as to the status of Herbert Wright of the Newport Fire Department with respect to Social Security.

As you know, federal-state agreements may not include positions covered by a firemen's retirement system. Under the Firemen's Retirement System of this state membership is restricted to permanent firemen. A permanent fireman is defined as "a private fireman or officer regularly employed on full time duty by any fire department of any city or town or precinct in the state." An officer is defined as "any chief, deputy chief, captain, lieutenant or foreman regularly employed by a fire department of any city, town or precinct in the state." RSA 102:2.

You point out in your letter that the Town of Newport originally listed Mr. Wright as a fireman but subsequently this designation was changed to janitor. You also state that Mr. Wright presides at the regular meetings of the firemen and that he acts as a janitor at the fire station only.

Ordinarily there is no reason to question a town's designation of a particular employee. In this situation, however, in view of the previous inconsistent listings and in the light of additional inquiries made by your department, a doubt exists as to the correctness of the final listing of Mr. Wright. In such situations you are not required to accept the town's listing as final, but may examine all of the facts before making a determination. Accepting the town's listing as final and ignoring other facts which might come to your attention would permit circumvention of the exclusion of the Social Security Act and in the long run would be unfair to the employee in question.

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Mr. James J. Barry, Commissioner

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The basic question existing in this case is whether Mr. Wright is paid by the Town of Newport for services performed as a permanent fireman. This factual determination is to be made by you as the State Agency.

It might assist you in making this determination to ascertain whether Mr. Wright was elected or appointed and if appointed to ascertain the identity of the persons who made the appointment. Discussion of this question with the appointing authorities should be of value. It might also be desirable to discuss this problem with the treasurer or other disbursing officer of the town in order to determine his designation of the position held by Mr. Wright.

In this situation you start with the basic premise that Mr. Wright is a town employee. As such he is entitled to participate in Social Security unless you conclude that he is a permanent fireman. Certain facts which would support this conclusion appear in your letter. You state that he goes to all fires and has no other job. As a follow-up it might be desirable to determine whether or not a volunteer fire company is in existence in Newport. If so, examination of their records should show whether Mr. Wright has been listed or paid as a member of the volunteer group.

If we can be of further assistance to you in resolving this question please do not hesitate to ask. As things stand now we believe that further investigation is in order before making a final determination.

Very truly yours,

Elmer T. Bourque
Assistant Attorney General

ETB/T